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OCTOBER TERM 1976

CASE NO. 76-1474

DALTON ABBOTT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

Petitioner, Dalton Abbott, prays that a writ of certiorari be issued to review the judgment of the District Court of Appeal of Florida, Third District, entered in the above-entitled case on May 25, 1976.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida Third District is printed in the Appendix A hereto, *infra* (pp. A-1, A-11), is reported at 334 So. 2d 642, *rehearing denied* July, 1976 (Appendix B hereto). The Petition for a Writ of Certiorari to the Florida Supreme Court is printed in Appendix C hereto, *infra* (pp. A-13, is reported at ____ So. 2d_____ and the denial of the rehearing thereon is printed in Appendix C hereto, *infra* (pp. A-13), and is reported at _____ So. 2d_____.

JURISDICTION

The Judgement of the District Court of Appeal of Florida, Third District was entered on May 25, 1976, Appendix A, *infra* (p. A-11). A timely petition for rehearing was denied July 29, 1976, Appendix B, *infra* (p. A-12). A Petition to the Florida Supreme Court for a Writ of Certiorari was denied on Jan. 24, 1977. Appendix C, *infra* (p. A-13), and the rehearing on such Petition denied March 29, 1977, Appendix D, *infra* (p. A-14). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3) and Rule 22, *Rules of the United States Supreme Court.*

QUESTIONS PRESENTED

1. Whether the Florida trial court erred to the substantial prejudice of the Petitioner and denied him his constitutional rights to a fair trial and due process of law guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution when, in a 66 count information in which the Petitioner was charged as a Defendant only in the last two counts, was not charged as a Defendant in the first 64 counts and the information did not allege a common conspiracy between the defendant(s) in the first 64 counts and the Petitioner, the petitioner's timely filed motion for relief from misjoinder was denied?

2. Whether the Florida trial court erred to the substantial prejudice to the Petitioner and denied him his constitutional rights to compulsory process over witness, due process of law and a fair trial guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution when it denied Petitioner's motion for severance to gain the exculpatory testimony of two co-defendants and one of those defendants filed a sworn affidavit in support of the Petitioner's motion promising to testify for the Petitioner immediately following his own trial, and said affidavit set forth the sum and substance of the exulpating co-defendant's promised testimony?

3. Whether the Florida trial court erred to the substantial prejudice of the petitioner and denied him constitutional rights to due process of law and a fair trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution when it denied Petitioner's various motions for mistrial based upon inflamatory and prejudicial prosecutorial comments during the trial and in the summation to the jury?

4. Whether the trial court erred to the substantial prejudice of the Petitioner and denied him the due process of law and a fair trial as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution when it denied Petitioner's motion for continuance based upon inflamatory and prejudicial pre-trial publicity?

STATUTES INVOLVED

The Florida statutory provisions involved, *Florida Statutes* Sec. 776.03 and Florida Statutes, Sec. 833.04, are set forth in Appendix E and F, respectively, *infra* (pp. A-15, A-16). *Florida Rules of Criminal Procedure,* Rule 3.150, *Joinder of Offenses and Defendants,* is printed at Appendix G, *infra.*

STATEMENT OF FACTS

This is a prosecution under two State Statutes familiarly known as the Conspiracy Statute, *Florida Statutes,* Sec. 833.04 and the State's Accessory After the Fact Statute, *Florida Statutes,* Sec. 776.03. The Petitioner was informed against and tried in a 66 Count criminal information, Case No. 74-3896, with three other defendants. Of the multi-defendants charged in the information relevant hereto were: one defendant who was charged in Counts 1 through 64 and two other defendants charged along with the Petitioner only in Counts 65 and 66.

Of the first 63 counts of the information, every third count, commencing with the first, charged one of the Petitioner's co-defendants, S. K. Bronstein, prior head of the famous Cedars of Lebanon Hospital with larceny, forgery and uttering of a forged instrument, respectively, all emanating from Bronstein's executive position in the hospital corporation. Count 64 of the information charged Bronstein and another, but *not* the Petitioner, with a conspiracy to commit grand larceny between 1967 and December, 1973.

Count 65 of the information charged the Petitioner and two other co-defendants, *but not* including *Bronstein,* with a conspiracy beginning January 1, 1974 and continuing to and including May 20, 1974, to unlawfully assist and maintain Bronstein as accessories after the fact to his felonies of grand larceny, forgery and uttering a forged instrument. Count 66 of the information charged the petitioner and the other co-defendants charged in Counts 65, *BUT AGAIN NOT Bronstein,* with the substantive crime of unlawfully maintaining, aiding and assisting Bronstein as accessories as to the fact, allegedly between January 10, 1974 and May 20, 1974.

In pertinent part Count 65 of the subject information alleged:

> "... that, Sheldon Turner, Dalton Abbott... beginning on the 1st day of January, 1974, and continuing to the 20th day of May, 1974, in the county and state aforesaid, did unlawfully and feloniously agree, conspire, combine or confederate with one another and with one S. K. Bronstein to commit a felony, to wit: S. K. Bronstein or with one Harold Simonoff or both, to commit a felony, to wit: S. K. Bronstein as accessories after the fact that the felonies of grand larceny or forgery or uttering a forged instrument, in violation of 766.03, *Florida Statutes,* that is to say the said Defendants did unlawfully agree, combine, conspire or confederate with one another, and with S. K. Bronstein or with one Harold Simonoff, or both to unlawfully maintain or assist or otherwise aid S. K. Bronstein... knowing that the S. K. Bronstein had been a principal in the commission of the felonies of grand larceny or forgering or uttering a forged instrument, with intent that S. K. Bronstein would avoid or escape detention, arrest, trial or punishment..." (emphasis added)

and Count 66 charged:

> "... that, Sheldon Turner, Dalton Abbott... between the 10th day of January, 1974, and the 21st day of May, 1974, in the County and State aforesaid, did unlawfully and feloniously maintain or assist or otherwise aided as accessories after the fact, that one S. K. Bronstein well knowing of the said felonies and grand larceny by the stealing and taking away cash, being the personal property of another, to-wit: Cedars of Lebanon Hospital Corp., a Florida corporation, as owner of custodian, in violation of 811.02 *Florida Statutes* of forgery by forging and endorsement or directing another to forge an endorsement on certain checks drawn by Cedars of Lebanon Hospital

Corp., a Florida corporation, with the intent to injure or defraud another in violation of 831.01, Florida (sic) or uttering or directing another to utter said forged instrument on Midtown Bank of Miami or Sunbank of Midtown or Bank of Coral Gables or Sunbank of Coral Gables with the intent to injure or defraud another in violation of 831.02 *Florida Statutes*... and with the intention that S. K. Bronstein would avoid or escape detention, arrest, trial or punishment..." (emphasis supplied).

That is to say, Bronstein, but not the Petitioner was charged as a defendant in Counts 1 through 64; the Petitioner but not Bronstein was charged as a defendant in Counts 65 and 66; the information did not charge both the Petitioner and Bronstein with the common conspiracy; the information did not allege a common plan or scheme perpetrated by the Petitioner and the other co-defendant charged only in Counts 1 through 64.

Prior to trial the Petitioner timely filed the motion for severance from misjoinder, setting forth and urging that pursuant to rule 3.150(b), *Florida Rules of Criminal Procedure,* Counts 1 through 64, and the defendant therein, Bronstein, were unlawfully and impermissibly joined with Counts 65 and 66 and the defendants therein, especially the Petitioner. The motion also requested that Counts 1 through 64 and the defendant therein be tried separately from Counts 65 and 66.

Also prior to trial the Petitioner filed a motion for severance along with a memorandum of law and affidavit signed and sworn to by the Petitioner's co-defendant, Bronstein, the motion set forth and urged that two of the Petitioner's co-defendants scheduled to go to trial would testify in behalf of the Petitioner and exonerate him, if the two defendants were severed from and tried prior to him. In the affidavit submitted by the Petitioner, his co-defendant, Bronstein, said:

"2. That once I am removed from criminal jeopardy I will testify in behalf of Dalton Abbott, regarding counts 65 and 66 of Case No. 74-3896.

3. That my testimony in behalf of Dalton Abbott would exonerate him from any criminality in Counts 65 and 66 in Case No. 74-3896.

4. That I would testify that Dalton Abbott lacked any knowledge of the offense of larceny, forgery and uttering forged instruments of which I am now charged in Counts 2 through 64 of Case No. 74-3896.

5. That I would testify that I never informed Abbott of any true facts concerning what is now Counts 1 through 64 of Case No. 74-3896." (R. 5896).

In the course of the hearing on the severance motion, Bronstein indicated his willingness to go to trial in advance of the Petitioner. The Petitioner's other, offering co-defendant who promised to exonerate him indicated in open court that if called to testify for the petitioner at a separate trial, he too would give exonerating testimony consistent with that set forth in the Petitioner's motion. Counsel for the two co-defendants also stated to the trial court that the nature of their respective clients' testimony would be exonerating to the Petitioner. Indeed, Bronstein's counsel stated to the trial court that his client would testify for the Petitioner immediately following his own trial. (R. 2388).

Despite the proffers of testimony and specific facts made known to the trial court during the hearing on the two foregoing motions, Petitioner's motion for severance from misjoinder and for severance to gain the exculpatory testimony of two co-defendants were denied.

To the foreogoing improperly decided motions for severance is added the following prosecutorial misconduct, which, as patently demonstrated by the record, was calculated to alienate the jury against the Petitioner. The prose-

cutor's conduct continued to their final argument which the trial court permitted to be bifurcated, allowing the State Attorney himself to make argument notwithstanding the fact that such overlapped that of the State's chief trial counsel. The design of the prosecutors was also to intimidate and inflame the jury into the veredicts returned, especially that against the Petitioner.

Early in the trial proceedings below, the court admonished all attorneys (R. 1821-1827) that it was not going to tolerate conduct exceeding professional parameters and specifically stressed that procedure to be followed by the attorneys when another makes an objection. The trial court then went on to specifically admonish one of the prosecutors, the chief trial counsel, from instigating any misconduct on the part of any other attorney, saying,

> "... the court has the feeling that perhaps you're aggravating the situation. Now, I hope this feeling disappears.

In the same colloqui between the trial court and the attorneys representing the respective parties, the same prosecutor nevertheless thought it appropriate to remark to the court,

> "I can only state to the Court that my understanding of the legal profession is you can make an objection and protect your client's rights without engaging in such witticism as panic button, hit me where it hurts, I really tell it like it is, the American way and all of that nonsense that inflates from this man's mouth."

and then ended his remarks with the following personal attack on some of the defense counsel:

> "There's the difference in acting like a clown and being a lawyer. Now, whether Mr. Haft recognizes that difference or not, I don't know."

During more heated moments in trial the foregoing personal attacks against some of the defense counsel were supplemented with the following:

> "... to make an objection without Mr. Haft's large mouth interrupting me." (R. 2105)

and later in the proceedings the chief prosecuting trial attorney aimed his vitriolic verbiage at another defense attorney, saying:

> "... he's made (the objection) again and again, and the Court ruled again and again.

The cumulative effect of his remarks prompted this colloqui:

> "THE COURT: Just a minute, Mr. Carhart. Now, Mr. Pearson has a right to stand and object at any time.
>
> "MR. CARHART: I understand he has that right, your honor. And I have a right to object to his objection.
>
> "MR. PEARSON: No, I don't believe that's so, your honor.
>
> "THE COURT: Proceed, overruled your objection (Mr. Carhart's)." (R. 2618-2619)

Then after the prosecutor leveled another attack against Petitioner's co-defendant for allegedly badgering "witnesses all day" (R. 4330), the lower court cited the prosecutor for contempt (R. 4330-4331), but never reduced that finding to a judgment in the county's official records, an especially curious omission to say the least. The trial court's omitting to render a "judgment" of contempt against the prosecutor, like his failure to cite the prosecution for contempt as it did some defense counsel during the numerous instances where the interaction between and among the various attorneys became "heated," portrays a certain one-sidedness on the part of the trial court but more importantly demonstrates the intent of the prosecution to inflame the jury against both the defendants and their counsel.

To this is added the final argument of both prosecutors which intentionally and patently castigated the defense counsel on the one hand and appealed to sympathy and community sentiment against the defendants on the other, all in violation of cardinal proscriptions of prosecutorial misconduct. These violations include such remarks as:

> "The defendant in this case is Sanford K. Bronstein. He is on trial. He is charged with a crime. You must decide his guilt or innocence.
>
> Those are the people you are trying in this Court.
>
> The attorneys, they don't matter a damn. They jump around and stand up and shout and everything else, and sometimes I think they do more obstruction than anything else. The attorneys don't mean anything in this case.
>
> Whether you like Norman Haft or don't --Mr. Pearson: I object to that remark, your honor.
>
> Mr. Carhart: Or whether you like Ed Carhart or not, that's not the issue in this courtroom. And each of you said that you will not try this case on the personalities of the attorneys. And don't let yourselves be mislead or deflected from what your duty is here, the guilt or innocence of the people charged." (R. 4927).

Defense motions for mistrial were denied (R. 4934-35), as were requested curative instructions. (R. 4935-36). Instead, the Court informed the prosecutor, "you just take care of that in your own way" (R. 4934, 4935-36, 4937-38), which the prosecutor did in consistent fashion by continuing:

> "Let me just say to you as concerns my remarks concerning attorneys, the Court will instruct you on what the duties of attorneys are in the course of a trial. The gist and tenor of my remarks are that oftentimes attorney generate more heat than

> light on the issues in assisting the jury in arriving in a search for the truth." (R. 4940).

Counsel's renewed objections were again overruled. (R. 4940).

The second category of reversably prejudicial prosecutorial argument, appealing to sympathy and community sentiment, included the following made by the county's State Attorney:

> "Well, I tell you something. They're not too well connected in this courtroom. And I don't believe that they'll get you to rewrite the law for them. And for you to do anything, based upon the evidence and sworn testimony as it came to you from the witness stand, other than to find them guilty of every count in this Information with which they are charged, you'll have to rewrite the law. (R. 4983)
>
> These defendants are drowning men grasping at straws. And they are drowning in a sea of evidence and that sea of evidence is right here on this table. And is available to you if you need to refresh your minds after five weeks. You can read any of it that you asked for in the jury room.
>
> But, they are grasping at straws. They are hoping that some way they are going to convince you to come up with some outrageous decision that would not be based on the testimony or the evidence that comes to you on the witness stand, or the law that His Honor will charge you at the close of the case.
>
> When you sit here in the very awesone position that you sit in as a jury trying the facts, and with the responsibility of being judges of the facts you sit here not only for the six of you for yourselves, but you really sit here for almost a million and a half people in Dade County. You sit here representing them.

Your decision will determine whether people will say, well, if you steal big enough, you get away with it. Just steal enough and you can get away with it. Your decision will make that determination. (R. 4984).

As all motions for mistrials made throughout the original proceedings, the motion for mistrial based upon the intimidating and designed effect of the foregoing argument to coerce the jury into returning a guilty verdict (R. 4985-86) was denied. (R. 4986).

Moreover, all of the foregoing errors and omissions which worked to the detriment of the Petitioner's constitutional rights, as aforesaid, may well have been as influenced by the deluge and saturating news dissemination of the pre-trial and impending trial proceedings as such dissemination demonstratively prejudiced the Petitioner's ability to harness a fair and impartial jury from the community in which the trial proceedings were conducted.

Petitioner's trial was scheduled to commence on Monday, September 23, 1974. On Friday, September 13, 1974 the Miami Herald, the largest circulating newspaper in Dade County, Florida, ran the following headlines:

"STATE BARGAINS WITH BRONSTEIN; U.S. PROSECUTORS AWAIT OFFER." (R.336).

On September 17, 1974 a news article carried the story of a co-defendant in Counts 65 and 66 of the Information, TONY GIL, pleading guilty and starting immediate sentence in the county jail. On September 19th, 1974, the petitioner moved for a continuance (R-5854-56), seeking additional time to allow the effect of highly prejudicial trial publicity that had been published as of that date to dissipate in order "to afford the defendant a right to a fair trial." (R.5854-55). This and renewed motions for continuance were all denied. (R.211).

Then on September 20, 1974, the Miami herald again ran a headline story of the Petitioner's trial, headlining the story "SEPARATE TRIAL REJECTED" and reiterating therein Mr. Gil's guilty plea. Additional news articles amply demonstrating the prejudicial quality of the pre-trial publicity were appended to the motions for continuance.

The individual and certainly the cumulative effect of the inflamatory and prejudicial pre-trial publicity crystalized during the voir dire examination of a potential juror who, despite several disclaimers during previous questioning, finally made the following startling revelations when she conceded at (R. 1215-1224):

"If you are going to commit a crime, make it big, because is easier to get off.

But I do have a concern, yes.

Well, I don't really want to, but if I felt I could remedy a situation by being a juror.

Q. Mr. Pearson: One question, your honor. May I ask her what situation she wants to remedy by sitting as juror?

THE COURT: Let the record reflect that there was no response from the potential juror".

As indicated avove, the District Court of Appeal of Florida, Third District, affirmed the convictions of Petitioner and one other defendant, not here concerned. One co-defendant did not appeal; the other, Bronstein, has not argued his appeal to the first level of the Florida appellate courts as of the filing of this Petition. In affirming the Petitioner's conviction the Third District Court of Appeal of Florida, after paying minimal lip-service to federal standards of due process of law and a fair trial as is hereinafter more fully set forth, distinguished the undistinguishable and trivialized those standards, reducing them to hollow nonsequiturs.

REASONS FOR GRANTING THE WRIT

1. Whether the Florida trial court erred to the substantial prejudice to the Petitioner and denied him his constitutional rights to due process of law and a fair trial guaranteed by the 6th and 14th Amendments of the United States Constitution when it denied Petitioner's motion for severance to gain the exculpatory testimony of two co-defendants and one of those defendants filed a sworn affidavit in support of the Petitioner's motion promissing to testify for the Petitioner immediately following his own trial, and said affidavit set forth the sum and substance of the exculpating co-defendant's promissing testimony?

The first question presented concerns a fundamental question of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution, a question previously settled by a number of Federal Circuit Courts of Appeal and especially in the United States Court of Appeals for The Fifth Circuit, The Circuit in which the State of Florida is geographically situated. The trial court's ruling and that of the District Court of Appeal of Florida, Third District run directly contrary to the due process standards established by *Byrd V. Wainwright,* 428 F. 2d 1017 (5th Cir. 1970) and the *United States v. Martinez,* 486 F. 2d 15 (5th Cir. 1973), and as emphasized in *United States v. Morrow,* _____F. 2d _____, (5th Cir. Slip op. No. 74-2676, decided August 16, 1976), decided well after petitioner's trial. The due process standards established by *Byrd v. Wainwright, supra,* were far from unique to the 5th Circuit. See *United States v. Echeles,* 352 F. 2d 892 (7th 1965); *United States v. Shuford,* 454 F. 2d 772 (4th 1972).

In *Byrd v. Wainwright, supra,* a federal habeas corpus proceeding seeking review of a Florida State conviction, the United States Court of Appeals for the 5th Circuit established the criteria essential for severance in order to gain the exculpatory testimony of co-defendants otherwise

reluctant to testify in a joint trial. Byrd's motion was made and the order denying it entered immediately before trial exactly like Petitioner's. In affirming the District Court's granting of the writ the Fifth Circuit began its discourse by saying at page 1018:

> "We examined the matters known to the trial judge at the time he ruled on the motion to sever, recognizing that a motion for a separate trial is addressed to the discretion of the Court, reviewable for abuse of discretion (citations omitted)..."

and went on to say at page 1019:

> "In the interest of full understanding we note events which took place at the trial. In doing so, we recognize that we are considering the judge's exercise of discretion at the pre-trial stage when he denied the motion, and trust he is not to be found in error for that denial on the basis of maters that became known to him later or events occurring at the trial."

Thus the Court emphasized that the critical elements of a motion for "exculpatory severance" are the facts known by the trial judge when he denies the motion when judging, on review, the impropriety of that denial.

In *Byrd* the trial court was presented with or otherwise apprised of the following:

> "First, of seven defendants charged with a single mass rape, six confessed to various degrees of culpability. Only one of the confessions named Byrd as present at the commission of the rape; one affirmatively said Byrd was *not* present; and one confession implicated Byrd as an active participant in the crime.
>
> Second, Byrd was the only non-confessing co-defendant.
>
> Third, the other defendants might not take the stand and Byrd could not compel them to testify in a joint trial or even call them his witnesses.

> Fourth, the one confessor who first said Byrd was present at the scene was confused and subsequently advised that Byrd was not present.
>
> Fifth, that the other Defendant told Byrd's counsel he was not present at the rape and would so testify.

Based on the foregoing facts and relying chiefly on *United States v. Echeles, supra,* the Fifth Circuit delineated the following areas on inquiry relative to ruling upon a motion for exulpatory severance, the erroneous denial of which will violate the movant's constitutional rights to a fair trial.

> *First,* the movant must desire to use the testimony of his co-defendant(s). In this respect, *Byrd* carefully pointed out that defendant and his counsel *need not* testify under oath or submit affidavits of such an intent. *Id.* at 1020. Petitioner's motion and his counsel clearly, unequivocably, and emphatically expressed the former's desire and intent to call two of his trial co-defendants to testify in his behalf.
>
> *Second,* the projected testimony must be exculpatory in nature through a clear showing of what the testimony will be.

In this respect both Petitioner's motion and the affidavit of co-defendant, Bronstein, outlined the substance and exculpatory character of Bronstein's testimony. The motion, affidavit and acknowledgments in court by the co-defendants concerned and their counsel all state:

> *First* that two of Petitioner's co-defendants were prepared to testify as to the latter's lack of knowledge of Bronstein's felonies.
>
> *Second,* Bronstein was prepared to testify how he denied the existence of the facts alleged in the first 64 counts of the information charged against him.

> *Third,* Bronstein was prepared to testify that he did not inform the Petitioner of any true facts concerning the allegations set forth in the first 64 counts of the information. Additionally, a second co-defendant indicated in open court that his testimony would be exculpatory.

The foregoing was and is indisputably relevant and material to the Petitioner's defense to charges requiring, as essential elements, knowledge of Bronstein's alleged prior felonies, knowledge of the alleged conspiracy and an agreement with the other co-defendants to be an accessory to those alleged felonies. In short, Petitioner's complete defense was stripped from and denied to him. *United States v. Echeles, supra,* (especially that portion explaining the "obvious importance" of Echeles co-defendants' testimony.)

Under the facts of the decision in *United States v. Martinez, supra,* as well as the holdings in *Byrd* and *Echeles,* both *supra,* Petitioner's motion and supporting affidavit and the hearing on the motion mandated severance. In *Martinez* the denial of a motion for (exculpatory) severance was reversed on appeal based on criteria far short of that proffered by the Petitioner to the trial court. In *Martinez,* severance was required based only upon the oral statement of counsel:

> "... *Counsel* for Martinez and Huila *made the following statement* to the Court as to Martinez planned testimony...
>
> '... the defendant Martinez, if he was severed from this trial, would testify on behalf of the defendant, Huila and exculpate him from any involvement in the matter which Huila is charged with. But, under the circumstances, he can not take the stand because he is a defendant and will only inculpate himself.'" (emphasis supplied)

Martinez, supra, at 22.

> *Third,* The motion and hearing thereon must demonstrate a likelihood that the co-defendant(s) will be willing to testify if the defendant is tried separately.

In this respect, the above more than satisfied the requirements set forth in *Byrd, supra,* at 1021-1022, citing to *Echeles* and other authorities.

> *Fourth,* some showing as to why the co-defendant who offers exculpatory testimony will not testify in a joint trial.

Here, the statement of the co-defendant, BRONSTEIN, that he did not want to risk losing his 5th Amendement privilege to remain silent and against self-incrimination *at his own trial* explains beyond preadventure his unwillingness to aid the Petitioner in a joint trial. Likewise, Petitioner's other co-defendant's in-court statement. This reluctance foreclosed the Petitioner's *opportunity* to call his co-defendants to his defense, something utterly condemned in *Byrd, supra* at 1019, citing to *Echeles* and patently demonstrated Petitioner's "unique interest in being tried separately and later than... Bronstein. "*Id.* at pages 1021-1022.

The Third District Court of Appeal of Florida, in affirming Petitioner's conviction, considered Bronstein's promise to exculpate Petitioner when he was "out of jeopardy" as a qualified, indefinite promise, prompting an unworkable rule of law. Such a conclusion not only ignores the unqualified and expressed due process and fair trial standards established by the Federal authorities cited *supra,* but flies in the face of the clear expression of Bronstein's counsel, made in open court, that his client would testify "at a future trial without any worries about any federal cases or any subsequent cases." (R.238). In a period when thoughtful people are seriously concerned about

fundamental matters and the non-manipulation of the criminal justice machinery, the events and rulings of which review is herein sought certainly warrant the attention of this court.

2. Whether the Florida trial court erred to the substantial prejudice of the Petitioner and denied him his constitutional rights to a fair trial and due process of law guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution when, in a 66 count information in which the Petitioner was charged as a defendant only in the last two counts, was not charged as a defendant in the first 64 counts and the information did not allege a common conspiracy or plan or scheme between the defendant(s) in the first 64 counts and the Petitioner, the Petitioner's timely filed a motion for relief from misjoinder was denied?

The second question presented also concerns a fundamental question of due process and the right to a fair trial guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. The question goes to an interpretation of a Florida Rule of Criminal Procedure proscribing the misjoinder of defendants and is based upon so obvious a misconstruction and misinterpretation of that rule, unreviewed by the Florida Supreme Court, as to warrant review by this Court to correct the inherently prejudicial misjoinder which occurred in this case.

Rule 3.150(b), *Florida Rules of Criminal Procedure,* provides:

> "(b) *Joinder of defendants.* Two or more defendants may be charged in the same indictment or information upon which they are to be tried:
>
> (1) When each defendant is charged with accountability for each offense charged:
>
> (2) When each defendant is charged with conspiracy and some of the defendants are also

charged with one or more offenses alleged to have been committed in the furtherance of the conspiracy; or

(3) When, even if conspiracy is not charged and all defendants are not charged in each count, it is alleged that several offenses charged were part of a common scheme or plan.

"Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count."

The decision of the Florida 4th District Court of Appeal in *Wilson v. State,* 298 So. 2d 433 (4th Dist. 1974), contains not only a thoroughly lucid but also the only other Florida appellate decision on its joinder rule. *Wilson* establishes that an inherently prejudicial misjoinder occurred in Petitioner's trial. Since any joinder outside the parameters of the joinder rule is inherently prejudicial *Methenay v. United States,* 365 F. 2d 90, 9 Cir. 1966); *United States v. Marionneaux,* 514 F. 2d 1244 (5th Cir. 1975); *United States v. Levine,* _____F. 2d _____ (5th Cir. Slip. Op. No. 76-1543, decided Feb. 7, 1977), Petitioner's deprivation of due process of law and his right to a fair trial necessarily flow from the misjoinder.

In *Wilson v. State, supra,* Wilson and another defendant, Wright, were informed against in a five count information. The first three counts charged offenses against Wright only. The last two counts charged offenses against Wilson only. The information did not charge each of the Defendants with accountability for all of the offenses charged. It did not charge the conspiracy by the two defendants, nor did it allege that the several offenses charged were part of a common scheme or plan. Wilson's pre-trial and trial motions for severance from Wright, based upon the asserted misjoinder of *defendants* in a single information, were denied. The jury found both defendants guilty and Wilson unsucessfully moved for a new

trial on the basis of improper joinder. On appeal the District Court of Appeal of Florida, 4th District, reversed the judgment and sentence, stating the issue presented thusly:

"The sole point of appeal is whether a motion for severance must be granted when two or more defendants are joined in a multi-count indictment or information unless the charging document makes one of the following allegations:

(a) Each defendant is charged with accountability for each offense, or (b) each defendant is charged with conspiracy; or (c) the several offenses charged are part of a common scheme or plan. The answer lies on the interpretation of Rules 3.150(b) and 3.152(b), *Rules of Criminal Procedure* and authorities construing similar Federal Rules." 298 So. 2d at 434-5.

After reviewing the similarities and differences between Rules 3.150(b), *Florida Rules of Criminal Procedure* and Rule 8(b), *Federal Rules of Criminal Procedure,* the court in *Wilson* noted:

"In Florida the requirement for joining several Defendants in a multi-count charging document are found in Rule 3.150(b). If the charging document does not meet the requirement set forth in Rule 3.150(b), a defendant (upon motion) is entitled to a severance without a demonstration of prejudice. The burden is not on the defendants but on the state to show its authority for joining several defendants in one indictment or information. Rule 3.152(b) comes into play and requires the showing of prejudice when a joinder was proper in the first instance because it was authorized by Rule 3.150. The information in the present case clearly fails to fall within any of the categories which authorizes the joinder of several defendants.

Therefore appellant was entitled to a severance upon the filing of his written motion." (emphasis supplied, citation omitted) 298 So. 2d at 435.

The Fourth District Court of Appeal, in *Wilson,* explicitly rejected the State's argument that reversal was not required unless the appellant had demonstrated actual prejudice from the misjoinder:

"The State's argument that appellant has failed to show any prejudice resulting from the joint trial misses the mark. Procedural rights such as this are not to be granted or denied in the discretion of the Court. They are vested rights, the denial of which constitutes reversable error..." 298 So. 2d at 435.

Based upon *Wilson* it is clear that the information upon which the Petitioner was tried did not conform with the requirements of Rule 3.150(b), *supra.*

First, it is clear that Petitioner was not charged with the accountability for the offenses charged in counts 1 through 64. Likewise, co-defendant Bronstein was not charged with the accountability for the offenses charged in counts 65 and 66. Consequently, the information did not meet the standard set forth in Rule 3.150(b), *supra.*

Second, it is clear that at *no* point in the information were Bronstein and Petitioner charged with the accountability for the same conspiracy. In Counts 64 Bronstein was *charged* with conspiracy *but Petitioner was not even mentioned in that count.* Petitioner in Count 65, *was charged* with conspiracy, but Bronstein, in Count 65 was not charged with the accountability. In Count 65, Bronstein was named as an uninformed against co-conspirator, *but he was not charged as a defendant in that count.* Because Bronstein was not charged with conspiracy in Count 65 of the information, the only count in which Petitioner was charged with conspiracy the information failed to meet the standards set forth in Rule 3.150 (b) (2), *supra.*

Third, it is clear that the information at no point alleged "that the several offenses charged were part of a common plan or scheme." Consequently, the information did not meet the standard set forth in Rule 3.150(b) (3), *supra.*

In closing its *Wilson* opinion the Florida Fourth District Court of Appeal quoted with approval the following excerpt from *Methenay vs. United States, supra:*

"... Any misjoined defendant who suffer(s) a conviction (is) entitled to a new trial separate from the others for the reason that '(i)t cannot be said in such case that all of the defendants may not have been embarassed or prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions'." 298 So. 2d at 435.

In denying the Petitioner's motion for severance from misjoinder, the trial court violated the standard set forth in Rule 3.150(b), *Florida Rules of Criminal Procedure* and in *Wilson vs. State, supra.* The violation, in and of itself, also constituted violations of the Petitioner's constitutional rights to due process of law and a fair trial. The only basis the 3rd District Court of Appeal expressed in affirming the trial court's denial of the subject motion was that the *offense* of accessory after the fact was *related* to Bronstein's prior felonies. However, Rule 3.150(b), *supra, Joinder of Defendants,* does not even mention the concept of "related offenses"; that concept is limited solely to Rule 3.150(a), *supra, Joinder of Offenses.* A joinder of offenses or defendants beyond the parameters of either Rule 3.150(a) or

(b) is inherently prejudicial to the Petitioner's right to a fair trial under the Due Process Clause of the 14th Amendment and the Fair Trial Clause of the 6th Amendment of the United States Constitution. *United States v. Graci,* 504 F. 2d 411, 413 (3rd Cir. 1974); *United States v. Marionneaux, United States v. Levine,* both *supra.*

This Court has never considered the inherent due process and fair trial violation when there is a misjoinder beyond the limits of the rules of joinder as prescribed by an appropriate *Rule of Criminal Procedure.* In the Federal system any joinder beyond the parameters of Rule 8 (the joinder rule) is, without exception, inherently prejudicial and mandates reversal and severance. See federal cases *op. cit.* The evil of the procedure allowed by the State court is plain. Petitioner seeks no more than fundamental fairness within the criminal process and his Petition is deserving of review by this Court.

3. Whether the Florida trial court erred to the substantial prejudice of the Petitioner and denied him constitutional rights to due process of law and a fair trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution when it denied Petitioner's various motions for mistrial based upon inflammatory and prejudicial prosecutorial comments in trial and in the summation to the jury?

The Third question presented also concerns a fundamental question of a defendant's constitutional rights to a fair trial. The question is prompted by the prosecutors' capitalizing on the misjoinder of defendants and a common trial in which one defendant is charged in the first 64 counts of a criminal information and a second defendant charged only in the last two counts, a situation patently demonstrating a prejudicially disproportionate quantum of proof against one defendant, the spill over from which necessarily taints the second defendant.

Treating each of the categories of impermissible, prejudicial prosecutorial misconduct:

A. *Comments on the Tactics and Character of Defense Counsel.*

The following comments by a prosecutor on the tactics or character of defense counsel were held improper in *Adams vs. State,* 192 So. 2d 42 (1st Dist. 1973):

> "Let me just show you what perverted and distorted things a lawyer can do when he wants to do it. How wrong it is, and when the lawyer tries to do such as this, it is disgusting.
>
> If he thought Mrs. Mayer had one word of testimony, he, himself violated his oath as a lawyer and violated his representation of this man and as a human being... he has no business being a lawyer if he hadn't talk with her and found out that she knew nothing about it. 192 So. 2d 764.

In reaching its holding the Court said at page 764:

> "The foregoing remarks perhaps do not constitute fatal error where their effect limited solely to the person toward whom they were formally addressed-- the remarks *might* have attitudinized the jurors against the appellant, and as such be prejudicial to his cause." (emphasis by the court)

The same prejudicial effect resulted below, especially since the prosecutor's argument does more than suggest, it commands, that counsel's function in the trial was to obstruct the jury's view of the evidence and stresses that a trial without counsel would be simpler and facilitate the jury's consideration of the evidence.

In *Anno,* Attack on Opposing Counsel--*Effect,* 99 A.L.R. 2d 508, 526:

> "The latitude allowed the prosecutor in attacking counsel for an accused is, by the nature of a criminal case considerably less than that allowed the defense counsel, who may, by an unfair attack upon the State's counsel, merely invite recrimina-

> tion. Courts hold prosecutors as high a standard as public officials, and even where they are able, for one reason or another, to sustain a conviction despite the prosecutor's improper attack upon defense counsel, they do so only after castigating the prosecutor for his misguided efforts."

Thus, an attack upon the honesty of defense counsel is almost always deemed prejudicial. In *Heskett vs. United States,* 58 F. 2d 97 (9th Cir. 1932), *cert. denied* 287 U.S. 643 (1933) the following prosecutorial remarks were held prejudicially improper: "I don't think counsel wants to get the facts; trying to hide the facts," and this is precisely the allegation made by the prosecutor below: "that counsel were obstructing the progress of the trial and do(ing) more obstruction than anything else." (R. 4927).

B. *The prejudicial prosecutorial appeals to sympathy and community sentiment.*

In the overlapping, redundant summation permitted by the trial court, the State Attorney urged that set forth in the Statement of Facts, *supra,* pp. 10-13. The argument of the prosecutors and their other misconduct, as aforesaid, as a whole, are prejudicial. Slighting, derrogatory references to defense counsel, coercive argument to the effect that the law will have to be rewritten to justify acquittal, and appeals to community sentiment, individually and collectively, present uncondonable prejudicial improprieties violative of a defendant's constitutional rights to due process of law and a fair trial. In affirming petitioner's conviction the Florida appellate court compounded the error of the trial court by applying an incorrect standard in determining the improprieties of the trial court's overruling of timely objections and denying motions for mistrial emanating from the prosecutor's arguments, utilizing a standard when there is a failure to object to prosecutorial comments. Compare *Wilson v. State,* 294 So. 2d 327 (Fla. 1974); *Thompson v. State,* 318 So. 2d 549 (4th Dist. 1975) with *Pait vs. State,* 112 So. 2d 380 (Fla. 1959).

This Court has never considered the standard as misapplied by the Florida appellate court relative to the prejudicially improper prosecutorial comments and arguments or as should have been applied under the mandate of *Pait vs. State, supra.* In a period when this Court has condemned prosecutorial comments in summation directed to a defendant's remaining silent at trial, *Griffin v. California,* 380 U.S. 609 (1966), and a defendant being cross examined at trial based upon his remaining silent following arrest or while in custody, *Doyle v. Ohio,* 96 S. Ct. 2240 (1976) and *United States v. Hale,* 95 S. Ct. 2133 (1975), the intolerable prosecutorial conduct and arguments of which review is herein sought must not be allowed to stand. The evils of those events certainly warrant the attention of this Court.

4. Whether the trial court erred to the substantial prejudice of the Petitioner and denied him the due process of law and a fair trial as guaranteed by the Sixth and 14th Amendments of the United States Constitution when it denied Petitioner's motion for continuance based upon inflamatory and prejudicial pre-trial publicity?

The constitutional standards against which potential prejudicial pre-trial publicity must be measured to determine whether the publicity may so infect the community as to constitutionally require a continuance or change of venue has been determined by this Court. *Sheppard v. Maxwell,* 384 U.S. 333 (1966) where this Court said:

> "But the court has also pointed out that '(1) egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.' And the Court has insisted that no one be punished for a crime without 'a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyranical power.'
>
> 'Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.'

> But it must not be allowed to divert the trial from the 'very purpose of a court system... to adjudicate controversy, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.' Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources."

and went on to say:

> "Thus, in *Marshall v. United States,* we set aside a federal conviction where the jurors were exposed 'through news accounts' to information that was not admitted at trial. We held that the prejudice from such material 'may indeed be greater' than when it is part of the prosecution's evidence 'for it is then not tempered by protective procedures.' At the same time, we did not consider dispositive the statement of each juror 'that he would not be influenced by news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice as a result of the articles."

The rationale for the rule, as expressed, is explained in the commentary to the *A.B.A. Standards, Fair Trial and Free Press,* Sec. 3.2 at 126-7:

> "First, many existing standards of acceptability tolerate considerable knowledge of the case and even an opinion on the merits on the part of a prospective juror. And even under a more restrictive standard, there would remain a problem of obtaining accurate answers on voir dire -- is the juror conciously or subconciously harboring prejudice against the accused resulting from widespread news coverage in the community? Thus a change of venue in continuance are to be of value, *they should not turn on the results of the voir dire;* rather they would constitute independent remedies

> designed to assure a fair trial when news coverage has raised substantial doubts about the effectiveness of voir dire standing alone.

This Court's standard relative to the due process and fair trial requirements of the Constitution was (a) not applied by the trial court and (b) ignored by the State appellate court. This bold statement is supported by the following:

First, on September 16th, 1974 Petitioner's co-defendant pleaded guilty to counts 65 and 66, the accessory after the fact counts, and sentenced to 90 days in the county stockade. (R. 122). On September 18, 1974 the trial court, on motion of the State Attorney, stayed execution of the co-defendant's sentence to allow him to assist the state in preparing for trial. (R. 136). But when that co-defendant testified (R. 3042-3298), he made the following startling revelations:

First, over defense objection on direct examination the prosecution is permitted to ask the co-defendant whether he plead guilty to the two charges against him (R. 3179-3183) and that he is presently in jail (R. 3044-47).

Second, on cross examination the co-defendant stated he had no reason to believe that the main culprit, Bronstein, was stealing (R. 3258-3268), the very knowledge essential for conviction as an accessory after the fact.

Third, the very pre-trial and trial publicity, therefor, which emphasized the co-defendant's guilty plea and sentencing was then compounded by the State Attorney by his use of such information during direct examination of a prosecution witness.

Fourth, the concession made by the potential juror during the extensive, individualized questioning of her is set forth in the Statement of Facts, *supra.*

The foregoing is precisely part of the justification for the reversal ordered in *Sheppard* where this Court also said at 384 U.S. 362-363:

"Due process requires that an accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial court must take strong measures to insure that the balance is never weighted against the accused. *And appellate tribunals have the duty to make an independent evaluation of the circumstances.* Of course, there is nothing that proscribes the press from reporting events that transpire in the court room. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity."

In affirming the action of the trial court, the Florida appellate court trivialized the standards established by this Court in *Sheppard* when it said, "when the publicity is neither inherently inflammatory nor the circumstances of the case egregrously prejudicial, the declarations of the jurors as to their impartiality must be dispositive unless the Appellant surmounts the burden of showing actual substantial prejudice to him..." When the massive pre-trial publicity renders any trial a *cause celebre* and thus may well influence any, let alone a substantial number of the trial court's rulings, especially like those discussed more fully *supra,* the conviction resulting from such judicial and prosecutorial improprieties as is also discussed more fully *supra* raises a question of such basic fairness of criminal process that is deserving of review by this court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should be granted by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District, mas mailed to the office of the Attorney General, Attention: Joel D. Rosenblatt, Assistant Attorney General, 8585 Sunset Drive, Miami, Florida 33143 on this 13 day of April, 1977.

Gerald J. Tobin

GERALD J. TOBIN, ESQ.

APPENDIX

APPENDIX A

DALTON ABBOTT, Appellant,
v.
The STATE of Florida, Appellee.
No. 74-1791.

District Court of Appeal of Florida,
Third District.

May 25, 1976

Rehearing Denied July 29, 1976

Defendant was convicted in the Circuit Court for Dade County, Sidney Weaver, J., of conspiracy to be an accessory after the fact and of being an accessory after the fact to the crimes of grand larceny, forgery and uttering forged instruments, and he appealed. The District Court of Appeal held, inter alia, that there was no abuse of discretion in denying motion for continuance based on pretrial publicity; that there was no error in joinder of defendant with principal defendant charged with 63 counts of larceny, forgery and uttering forged instruments; and that there was no abuse of discretion in denying motions for severance based on principal defendant's willingness to give exculpatory testimony or on basis of interaction between principal defendant's counsel and prosecutor.

Affirmed.

1. Criminal Law —586, 1151

Trial judge is vested with broad discretion in matters of requested continuance, and will not be reversed on appeal unless there is a clear showing of palpable abuse of such judicial discretion.

2. Criminal Law —1144.10

When publicity is neither inherently inflammatory nor the circumstances of the case egregiously prejudicial, declarations of jurors as to their impartiality must be dispositive unless defendant on appeal surmounts the burden of showing actual substantial prejudice to him from trial before the jury.

3. Criminal Law —591

Trial court did not abuse discretion in denying motion for continuance based on pretrial publicity in case in which 65 prospective jurors had some form of knowledge about the case and the nine who indicated they had or might have an opinion about the matter were excused, while the remainder declared, inter alia, that they would consider only the evidence presented at trial, and most indicated lack of interest in what they read or saw about the case.

4. Criminal Law —620(2)

Where principal defendant was charged with 63 counts of larceny, forgery and uttering forged instruments, there was no error in joinder of defendant who was charged with conspiracy to be and with being an accessory after the fact to such offenses. 33 West's F.S.A. Rules of Criminal Procedure, rules 3.150-3.152, 3.150(b).

5. Criminal Law —622(1), 1148

Motions for severance are addressed to the sound discretion of the trial judge, and order will not be reversed except for palpable abuse of judicial discretion, and thus it is incumbent upon defendant who appeals a denial of motion for severance to show at least a likelihood that he did not get a fair trial because of the denial of the motion to sever. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.152(b).

6. Criminal Law —618

Judicial efficiency and economy dictate one trial of multiple defendants where possible.

7. Criminal Law —622(2)

Trial court did not err in denying motion to sever based on principal defendant's willingness to give exculpatory testimony on behalf of moving defendant, where offer to

tender testimony was conditioned upon principal defendant's being removed from criminal jeopardy and the possibility of helpful testimony was remote in that the best that principal defendant could do for moving defendant would be to testify that former did not tell latter, who was charged with being accessory after the fact, that principal defendant was guilty.

8. Criminal Law 622(2), 867

Remarks and interaction between principal defendant's counsel and prosecutor were not so prejudicial as to have required declaration of mistrial or granting of a severance to other defendant.

9. Criminal Law —867

Granting or denial of motion for mistrial is matter of discretion with the trial judge, and such motion should never be granted in the midst of a trial unless there is absolute legal necessity to stop the trial and discharge the jury.

10. Criminal Law —1141(1), 1144.13(5)

Verdict or judgment of guilt arrives in District Court of Appeal clothed with a presumption of correctness, and all inferences to be drawn from the evidence are to be in favor of the verdict or judgement of guilt.

11. Criminal Law —1141(2)

It is burden of defendant, on appeal following verdict or judgment of guilt, to make error appear in the record.

12. Criminal Law —1159.2(8), 1159.3(3), 1159.4(1)

Conflicts in evidence and fact that evidence may have been susceptible of differing inferences and presented trier of facts with questions as to credibility of witnesses and weight to be given testimony and other evidence presented will not establish insufficiency of evidence to sustain a judg-

ment of conviction when the record discloses that there was competent substantial evidence in law for its support.

13. Criminal Law —723(1), 1144.10

Each case involving an alleged impermissible appeal by prosecutor to sympathy of jury must be considered on its own merits and within the circumstances pertaining when the questionable argument was made, and burden is on defendant to show that the comments constituted harmful error.

14. Criminal Law —1171.1(2)

In order to constitute reversible error, comments of prosecutor must be so fundamentally tainted that neither objection nor retraction could entirely destroy their sinister influence.

Phillip A. Hubbart, Public Defender, and Elliot H. Scherker, Asst. Public Defender, for appellant.

Robert L. Shevin, Atty. Gen., and Joel D. Rosenblatt, Asst. Atty. Gen., and Steven Ginsburg, Legal Intern; Richard E. Gerstein, State's Atty., and Lance R. Stelzer, Asst. State's Atty., for appellee.

Before PEARSON, HENDRY and NATHAN, JJ.

PER CURIAM.

The appellant, Dalton Abbott, was one of the defendants in an information which charged him in two counts. Other defendants were charged in other counts. Defendant Abbott was charged with conspiracy to commit a felony, to-wit: accessory after the fact and with being an accessory after the fact to the crimes of grand larceny, forgery and uttering forged instruments. He was found guilty by a jury, adjudication and sentence were entered and this appeal ensued.

The principal defendant at the trial of the seven defendants was S. K. Bronstein who was charged in sixty-three counts with appropriation of monies belonging to Cedars of Lebanon Hospital Corporation, an institution in Miami, Florida. In substance, those counts charged that Bronstein, the President of the Cedars of Lebanon Hospital Corporation, wrongfully caused that hospital to issue twenty-one checks to various payees, which were fraudulently endorsed and cashed and the proceeds of which were appropriated by Bronstein.

Abbott has presented four points for our consideration in this appeal. We have studied the voluminous record of the trial court proceedings in this cause and we conclude that none of the points demonstrates reversible error. All four points will be discussed in this opinion.

(1) The first point is whether the trial court erred in denying a co-defendant's motion for continuance based on television and newspaper publicity prior to trial. It is a general rule that the trial judge is vested with broad discretion in matters of a requested continuance, and by virtue of his closeness and intimacy with the circumstances of the case he will not be reversed on appeal unless there is a clear showing of a palpable abuse of this judicial discretion. *Matera v. State,* Fla. App. 1969, 218 So. 2d 180; *Sikes v. State,* Fla. App. 1973, 280 So. 2d 17.

During voir dire examination of the prospective jurors, each juror was asked whether he/she had heard, read or seen anything about the case. Those who replied affirmatively were asked whether or not what they observed caused them to form an opinion as to the guilt or innocence of the defendants. Of the sixty-five persons who had some form of knowledge about the case, only seven responded that they had formed an opinion, and two were not sure whether they had an opinion. Four of these nine were promptly excused for cause based on their statements of opinion. The other five were ultimately excused and formed no part of the final jury panel. The remaining prospective jurors (fifty-

six) all stated that they had formed no opinion as to the guilt or innocence of any of the defendants. The panel indicated that they understood that what was read or seen outside of court did not constitute evidence, and they agreed to consider only the evidence presented at trial. The jurors were asked if they could lay aside anything they may have read, observed or heard, or any feelings they might have. The response was affirmative. Affirmative response also came when questioned if they could give both the defendants and the State a fair and impartial trial. The jurors promised to consider each individual defendant separately. As to the television publicity, only sixteen prospective jurors saw anything at all about the case. At least thirty-four jurors saw absolutely nothing. Of those that saw anything on television, what they saw was characterized by the jurors themselves as: a glimpse, a few times, very little, no court proceedings, once over a month ago, twice, but nothing recently, and no opinion of what was seen, a little, but didn't learn from it nor remember. On the question of newspaper publicity, some of the jurors stated they seldom or hardly read the newspaper. Others restricted their readings to such sections as sports, television, comics and horoscopes. Others managed to "glance" through the newspaper or see headlines relating to the case. These people did not read any of the articles. Most of these people were not interested in what they read, did not remember anything, and only noticed anything several months prior to the trial when the story first broke. Only a few answered that they read articles relating to the case. Of all of the jurors who indicated they had heard or read something about the case, none of them knew of defendant Abbott, appellant herein.

(2, 3) In a case such as this, when the publicity is neither inherently inflammatory nor the circumstances of the case egregiously prejudicial, the declarations of the jurors as to their impartiality must be dispositive unless the appellant surmounts the burden of showing actual substantial preju-

dice to him from trial before the jury. *Irvin v. Dowd,* 366 U.S. 717, 81 S. Ct. 1639, 6 L.Ed.2d 751; *Gordon v. United States,* 5th Cir. 1971, 438 F.2d 858; *United States v. D'Andrea,* 3rd Cir. 1974, 495 F.2d 1170, 1172 fn. 5. Based on the foregoing, we find that the trial judge did not abuse his discretion in denying the motion for continuance based on pretrial publicity.

The second point is whether the trial court erred in denying the defendant's motions for severance made prior to and during the course of the trial. The thrust of this point is a 3-pronged attack, contending (1) that the trial court erred in denying Abbott's motion for severance seeking relief from misjoinder; (2) that the trial court erred in denying his motion for severance where it was shown that Bronstein, the principal defendant, charged with 63 counts of larceny, forgery and uttering forged instruments, would give exculpatory testimony on behalf of Abbott if a severance were granted; and (3) that the trial court erred in denying Abbott's motions for severance seeking relief from prejudicial joinder because evidence irrelevant to Abbott was introduced against Bronstein which was prejudicial to Abbott, and because verbal exchanges between Bronstein's counsel and the prosecutors, in the presence of the jury, rendered a fair trial for defendant Abbott impossible.

(4) On the question of misjoinder, Rule 3.150(b), Florida Rules of Criminal Procedure, provides:

> "(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information upon which they are to be tried:
>
> (1) when each defendant is charged with accountability for each offense charged;
>
> (2) when each defendant is charged with conspiracy and some of the defendants are also charged with one or more offenses alleged to have been committed in furtherance of the conspiracy; or
>
> (3) when, even if conspiracy is not charged and all defendants are not charged in each count, it is alleged

> that the several offenses charged were part of a common scheme or plan.
>
> Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count."

Rules 3.150, 3.151 and 3.152 of the Florida Rules of Criminal Procedure provide for one trial in instances involving related offenses as well as those instances involving several defendants charged with the same offense. Certainly, conspiracy to cover up a larceny is a related offense. In *Wilson v. State,* Fla. App. 1974, 298 So. 2d 433, 434-435, the rule is stated that joinder is not proper unless:

"... the charging document makes one of the following allegations: (a) each defendant is charged with accountability for each offense, or (b) each defendant is charged with conspiracy, or (c) the several offenses charged are part of a common scheme or plan. The answer lies in the interpretation of Rules 3.150(b) and 3.152(b), RCrP, and authorities construing similar federal rules."

We hold that the joinder of defendant Abbott with defendant Bronstein has not been shown to be error.

(5) On the question of severance due to Bronstein's willingness to give exculpatory testimony on behalf of Abbott, Rule 3.152 (b), RCrP, concerning "Severance of defendants," in pertinent part, provides:

> "(1) On motion of the State or a defendant, the court shall order a severance of defendants and separate trials:
>
> (i) before trial, upon a showing that such order is necessary to protect a defendant's right to a speedy trial, or is appropriate to promote a fair determination of the guilt or innocence of one of more defendants..."

Motions for severance are addressed to the sound discretion of the trial judge and the order will not be reversed except for palpable abuse of judicial discretion. *Grech v. State,* Fla. App. 1971, 243 So. 2d 216, 218. Therefore, it is

incumbent upon a defendant who appeals a denial of his motion for severance to show at least a likelihood that he did not get a fair trial because of the denial of the motion to sever. The only possibility of prejudice to Abbott that is urged is that Abbott was deprived of Bronstein's testimony that he, Abbott, did not know of Bronstein's larceny. But Bronstein could not testify as to what Abbott knew or did not know. The best that Bronstein could do for Abbott would be to testify that he did not tell Abbott that he, Bronstein, was guilty. Abbott's guilty knowledge, or lack of it, had to be determined by the jury from the circumstances surrounding Abbott's actions in attempting to help Bronstein to cover up the illegal dispositions of the hospital's money.

(6, 7) Judicial efficiency and economy dictate one trial where possible. Cf. *Eagle v. State,* Fla. App. 1971, 249 So. 2d 460. In addition, Bronstein's offer to tender testimony was contingent upon Abbott's being tried in a "separate later trial," and was conditioned upon Bronstein's being removed from criminal jeopardy. It is not clear whether this means after acquittal or after the exhaustion of appellate remedies. If the latter is the meaning, Abbott was asking for an indefinite postponement of his trial. This is a clearly impractical proposal. It is clear that Bronstein's offer to testify for Abbott was not an unconditional offer to testify at a separate trial. Because no real prejudice has been shown and because the possibility of helpful testimony from Bronstein was too remote, the court did not err in denying the motion to sever on this ground.

(8, 9) As to the interaction during trial between Bronstein's counsel and the prosecutor, the record reflects that the former was held in contempt on six occasions during the trial, and the latter on one occasion. In our opinion, however, the remarks they made were not so prejudicial as to have required a declaration of a mistrial or granting a severance. It has long been held that the granting or denial of a motion for mistrial is a matter of discretion with the

trial judge. *Garcia v. State,* Fla. App. 1962, 142 So. 2d 318; *Reis v. State,* Fla. App. 1971, 248 So. 2d 666, 670. Such motion should never be granted in the midst of a criminal trial unless there is an absolute legal necessity to stop the trial and discharge the jury. *Kelly v. State,* Fla. App. 1967, 202 So. 2d 901, 903; *Reis v. State,* supra.

During closing arguments, counsel advised the jury, as did the court during the course of the trial and in its instructions to the jury, to disregard the editorial comments made by the attorneys, since such comments are not evidence. No abuse of discretion has been shown in the denial of the motions for severance on this ground or on the other grounds discussed above.

(10-12) The third point is whether the trial court erred in denying Abbott's motion for judgment of acquittal where the evidence was insufficient to support the convictions as charged in the information. The burden of establishing error is always on the appellant. The verdict or judgment of guilt having arrive in this court clothed with a presumption of correctness, all inferences to be drawn from the evidence are to be in favor of the verdict or judgment of guilt. *Crum v. State,* Fla. App. 1965, 172 So. 2d 24, 25. As a general proposition, it is the burden of the appellant to make error appear in the record. *Bryant v. State,* Fla. App. 1967, 204 So. 2d 9. Conflicts in evidence and the fact that it may have been susceptible of differing inferences and presented the trier of the facts with questions as to credibility of witnesses and weight to be given to testimony and other evidence presented, will not establish insufficiency of the evidence to sustain a judgment of conviction when the record discloses there was competent substantial evidence in law for its support. *Wetherington v. State,* Fla. App. 1972, 263 So. 2d 294, 295. Without a recitation of the myriad facts in evidence implicating defendant Abbott, suffice it to say that from our review of the record, it is clear that there is competent substantial evidence to support the verdict and conviction of guilt.

(13, 14) Defendant's fourth point is whether the trial court erred in denying Abbott's motions for mistrial based on the prosecutor's prejudicial comments during closing arguments to the jury. Each case involving an alleged impermissible appeal by the prosecutor to the sympathy of the jury must be considered on its own merits and within the circumstances pertaining when the questionable argument was made. *Breniser v. State,* Fla. App. 1972, 267 So. 2d 23, 26. The burden is on the defendant to show that the comments of the prosecutor constituted harmful error, since prosecutorial comment may constitute harmless error. *Falcon v. State,* Fla. 1969, 226 So. 2d 399. In order to constitute reversible error, the comments must be so fundamentally tainted that neither objection nor retraction could entirely destroy their sinister influence. *Sherman v. State,* Fla. 1971, 255 So. 2d 263, 266. Having reviewed the closing arguments of the prosecutors in this case, we are of the opinion that they were neither harmful nor so fundamentally tainted that neither retraction nor request for cautionary instructions could destroy their alleged possible harmful influence. Therefore, reversal on this point is unwarranted.

Affirmed.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1976
THURSDAY, JULY 29, 1976

DALTON ABBOTT,
Appellant,

vs. *CASE NO. 74-1791*

THE STATE OF FLORIDA,
Appellee.

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy
ATTEST:
WILLIAM P. CARTER
Clerk District Court of
Appeal, Third District

By_____
Chief Deputy Clerk

cc: Elliot H. Scherker
Joel D. Rosenblatt
Lance R. Stelzer

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT IN AND FOR DADE COUNTY, FLORIDA)

APPENDIX C

SUPREME COURT OF FLORIDA

MONDAY, JANUARY 24, 1977

DALTON ABBOTT, *Petitioner,* *vs.* STATE OF FLORIDA, *Respondent.*	CASE NO. 50,032 DISTRICT COURT OF APPEAL, THIRD DISTRICT 74-1791

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 C (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ADKINS, ACTING C.J., BOYD, ENGLAND, SUNDBERG, JJ., and ROBERTS, RET. J., concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

cc: Hon. William P. Carter, Clerk
Hon. Richard P. Brinker, Clerk
Hon. Sidney Weaver, Judge
Hon. Ebliot H. Scherker
Hon. Joel D. Rosenblatt

APPENDIX D

IN THE SUPREME COURT OF FLORIDA
TUESDAY, MARCH 29, 1977

DALTON ABBOTT, *Petitioner,* *vs.* STATE OF FLORIDA, *Respondent.*	CASE NO. 50,032

Petitioner's Petition for Rehearing is hereby denied, and it is further

ORDERED that petitioner's Motion for Stay of Mandate is hereby granted and proceeding in this Court and in the District Court of Appeal, Third District, and in the Circuit Court in and for Dade County, Florida are hereby stayed to and including April 28, 1977 to allow petitioner to seek federal review and obtain any further stay from the appropriate federal court.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

Y
cc: Hon. W. P. Carter, Clerk
Hon. Richard Brinker, Clerk
Hon. Sidney Weaver, Judge
Hon. Bennett H. Brummer,
Hon. Elioot H. Scherker
Hon. Robert L. Shevin,
Hon. Joel D. Rosenblatt
Hon. Richard E. Gerstein,
Mr. Steven D. Ginsburg

APPENDIX E

777.03 Accessory after the fact

Whoever, not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity to the offender, maintains or assists the principal or accessory before the fact, or gives the offender any other aid, knowing that he had committed a felony or been accessory thereto before the fact, with intent that he shall avoid or escape detection, arrest, trial or punishment, shall be deemed an accessory after the fact, and shall be guilty of a felony of the third degree, punishable as provided in 775.082. 775.083, or 775.084.

APPENDIX F

(3) Whoever shall agree, conspire, combine, or confederate with another person or persons to commit any offense commits the offense of criminal conspiracy and shall, when no express provision is made by law for the punishment of such conspiracy, be punished as provided in subsection (4).

APPENDIX G

Rule 3.150. Joinder of Offenses and Defendants

(a) Joinder of Offenses. Two or more offenses which are triable in the same court may be charged in the same indictment or information in a separate count for each offense, when the offenses, whether felonies or misdemeanors, or both, are based on the same act or transaction or on two or more connected acts or transactions.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information upon which they are to be tried:

(1) when each defendant is charged with accountability for each offense charged;

(2) when each defendant is charged with conspiracy and some of the defendants are also charged with one or more offenses alleged to have been committed in furtherance of the conspiracy; or

(3) when, even if conspiracy is not charged and all defendants are not charged in each count, it is alleged that the several offenses charged were part of a common scheme or plan.

Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.